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Noteworthy:

- [Advice and Consent? How Clinton Chose Ginsburg; Did Clinton really let Republicans guide his decision-making? Byron York, National Review, 7/05/05](#)

“I believe it is necessary at the outset of these hearings on your nomination to define the nature and scope of our responsibilities in the confirmation process, at least as I understand them. . . . [A]s a Member of the U.S. Senate, I am not choosing a nominee for the Court. That is the prerogative of the President of the United States, and we members of the U.S. Senate are simply reviewing the choice that he has made.”

-Senator Joe Biden, confirmation hearing of Sandra Day O'Connor (1981)

“Whether the confirmation process goes smoothly will be determined by the president's selection. *He can pick judges with us*, as the founders wanted, or he can pick fights with us.”

-Senator Edward Kennedy, Fox Special Report (June 28, 2005)

Advice and Consent? How Clinton Chose Ginsburg

Did Clinton really let Republicans guide his decision-making?

Byron York, National Review, 7/05/05

After Republicans cited the confirmation of Supreme Court Justice Ruth Bader Ginsburg as a model of how a Senate confirmation should work — Ginsburg went from nomination to confirmation in less than seven weeks with little Republican opposition and was not forced to give her opinions on hot-button issues like abortion, gun control and gay rights — some Democrats have countered by arguing that Ginsburg succeeded so quickly because President Bill Clinton consulted closely with Republicans, then in the minority in the Senate.

Democrats have cited a portion of Sen. Orrin Hatch's autobiography, *Square Peg: Confessions of a Citizen Senator*, as evidence that Clinton worked extensively with Republican senators. In the following passage, Hatch discusses telling Clinton that his top choice, Interior secretary and former Arizona governor Bruce Babbitt, would have a hard time in the Senate:

I told him [Clinton] that confirmation would not be easy. At least one Democrat would probably vote against Bruce, and there would be a great deal of resistance from the Republican side. I explained to the President that although he might prevail in the end, he should consider whether he wanted a tough, political battle over his first appointment to the Court.

Our conversation moved to other potential candidates. I asked whether he had considered Judge Stephen Breyer of the First Circuit Court of Appeals or Judge Ruth Bader Ginsburg of the District of Columbia Court of Appeals. President Clinton indicated he had heard Breyer's name but had not thought about Judge Ginsberg.

I indicated I thought they would be confirmed easily. I knew them both and believed that, while liberal, they were highly honest and capable jurists and their confirmation would not embarrass the President. From my perspective, they were far better than the other likely candidates from a liberal Democrat administration.

The lesson, writes Markos Moulitsas of the left-wing website DailyKos, is that "Bush should follow Hatch's wise example." But a look at another account of the Ginsburg case suggests that while Clinton did consult with Hatch — just as President Bush has with some Democrats today — Clinton's preeminent concern was making sure that, after a series of failed executive-branch nomination, members of his own party, then in the majority in the Senate, would support his nominee. And in Babbitt's case, a powerful argument against his nomination was made by a Democratic senator from Babbitt's own state.

The best inside account of the selection process is in George Stephanopoulos's Clinton memoir, *All Too Human*. Stephanopoulos writes that Clinton's first choice for the court was New York Governor Mario Cuomo, but that Cuomo put the White House on an extended and frustrating period of waiting as he tried to make up his mind about whether to accept a nomination. "Clinton was ready to appoint Cuomo," Stephanopoulos writes — the president had even crafted his description of the idea justice with Cuomo in mind — but "Clinton hated how Cuomo always made everything so difficult."

So the president turned to other candidates. There were dozens. Clinton's next favorite was his friend from Arkansas, Richard Arnold. Liberals wanted Harvard's Laurence Tribe. Yale professor Stephen Carter's name came up, as did that of First Lady Hillary Rodham Clinton.

Stephanopoulos writes that the White House viewed an outside-the-box candidate like Mrs. Clinton as a "sexy" idea. But there was a problem. "Clinton's choice had to be ratified by the Senate, where Republicans hadn't forgotten the rejection of Robert Bork, and Democrats were reeling from their recent encounters with Zoe Baird, Kimba Wood, and Lani Guinier. Sexy was good, but safe was better. We simply couldn't afford another failed nomination." Stephanopoulos quotes Clinton himself saying, "We don't need another gang-that-couldn't-shoot-straight story."

After two months, Stephanopoulos writes, the top of the list came to include Interior Secretary Bruce Babbitt, First Circuit Court of Appeals Judge Stephen Breyer, and a group of candidates Stephanopoulos calls "firsts" for diversity purposes: David Tatel,

who was blind, Jose Cabranes, was Hispanic, and Ginsburg, who, Stephanopoulos writes, "would be the first Jewish justice since Abe Fortas, and the first woman to be appointed by a Democrat. More important, she was a pioneer in the legal fight for women's rights — a female Thurgood Marshall."

Babbitt was first to go. Contrary to the notion that Hatch shot down Babbitt, Stephanopoulos writes that Babbitt's policies on western issues like grazing fees and mineral rights "had enraged many Senate Republicans and more than a few Democrats, who had accused him of waging a 'war on the West'...Even Babbitt's home-state Democratic senator, Dennis Deconcini, called Clinton to advise against Babbitt." Having a nominee's home-state senator — especially one of the same party — nix a candidate is a very powerful sign, which in many cases would be enough by itself to sink a nomination. (In his own memoir, *My Life*, Clinton glosses over the story, making no mention of Hatch or Deconcini, instead explaining that, "I hated to lose Babbitt at Interior, as did large numbers of environmentalists who called the White House to urge that I keep him there.")

Breyer was next to go. Even though he was strongly supported by his old boss Sen. Edward Kennedy, Breyer not only had a "nanny problem," then a fashionable issue on Capitol Hill, but he also failed to impress Clinton during a one-on-one meeting.

That left Ginsburg, whom Clinton, after months of deliberating, nominated on June 14, 1993. At the news conference announcing her nomination, Brit Hume, then with ABC News, offended Clinton when he asked about "a certain zigzag quality in the decision-making process here. I wonder, sir, if you could kind of walk us through it, perhaps disabuse us of any notion we might have along those lines." An angry Clinton stopped the news conference right there, saying "How you could ask a question like that after the statement [Ginsburg] just made is beyond me."

To which Stephanopoulos responded, "But not beyond the pale. Brit just didn't know how right he was."